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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., NW., MS 2090
Washington, DC 20529-MS 2090

PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

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DATE: JUL 07 2011 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the case will be remanded to the director for further investigation.

The petitioner is a nursing care facility. It seeks to employ the beneficiary permanently in the United States as a "Physical Therapist-Level II." The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089 or labor certification) accompanied the petition. The director stated that the petitioner submitted evidence to show that the beneficiary's occupation was physical therapist, Level II. He concluded that:

> . . . the evidence of record does not establish that the beneficiary qualifies for an occupation listed in Schedule A, Group II (20 CFR 656), and your petition is not otherwise supported by a certification by the Department of Labor, or evidence that the alien's occupation is within the Labor Market Information Program; or, for aliens of exceptional ability in the sciences, arts, or business, that a job offer exemption would be in the national interest.

On appeal, the petitioner, through counsel, maintains that the petition qualified for approval for certification pursuant to Schedule A, Group 1.[1]

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Section 203(b) of the Immigration and Nationality Act (the Act) states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability.--
>
> (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational

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[1] The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

> interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.[2]

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Immigrant Petition for Alien Worker (Form I-140), must be "accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program."

The priority date of any petition filed for classification under section 203(b) of the Act "shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [U.S. Citizenship and Immigration Services (USCIS)]." 8 C.F.R. § 204.5(d). Here, the Form I-140, Immigrant Petition for Alien Worker was filed on November 14, 2007. Therefore, the priority date is November 14, 2007.[3]

The regulation at 20 C.F.R. § 656.15(c) provides in relevant part:

> *Group I documentation.* An employer seeking labor certification under Group I of Schedule A must file with DHS, as part of its labor certification application, documentary evidence of the following:
>
> (1) An employer seeking Schedule A labor certification for an alien to be employed as a physical therapist (§656.5(a)(1)) must file as part of its labor certification application a letter or statement, signed by an authorized state physical therapy licensing official in the state of intended employment, stating the alien is qualified to take that state's written licensing examination for physical therapists.

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[2] In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

[3] The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. Therefore these regulations apply to this case because the filing date is November 14, 2007.

> Application for certification of permanent employment as a physical therapist may be made only under this § 656.15 and not under § 656.17
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> * * *
>
> (d) *Group II documentation.* An employer seeking a *Schedule A* labor certification under Group II of *Schedule A* must filed with DHS, as part of its labor certification application, documentary evidence of the following:
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> (1) An employer seeking labor certification on behalf of an alien to be employed as an alien of exceptional ability in the sciences or arts (excluding those in the performing arts) must file documentary evidence showing the widespread acclaim and international recognition accorded the alien by recognized experts in the alien's field; and documentation showing the alien's work in that field during the past year did, and the alien's intended work in the United States will, require exceptional ability. In addition, the employer must file documentation about the alien from at least two of the following seven groups:

In this case, the ETA Form 9089 submitted by the petitioner indicated that the job title of the certified position is "Physical Therapist-Level II." As reflected on Part H of the ETA Form 9089, the job requires that the applicant have a Master's degree in Physical Therapy. No work experience or training is required. Alternatively, the applicant may have a Bachelor's degree (Physical Therapy) and five years of work experience. The petitioner sought visa classification for the beneficiary as an advanced degree professional or alien of exceptional ability pursuant to section 203(b)(2) of the Act.

As noted above, the director interpreted the ETA Form 9089 as a request to certify the beneficiary under 20 C.F.R. § 656.5, Schedule A, Group II, requiring exceptional ability, rather than under Group I, covering physical therapists and professional nurses. It is unclear whether the petitioner's use of the language "Level II" in the job title may have led the director to determine that the petition was only eligible for approval under Schedule A, Group II. However, the AAO notes that nothing in the remaining provisions of the ETA Form 9089 required exceptional ability. From a review of the record, the AAO believes that the petitioner was using the term "Level II" to relate to the skill level required for the position, rather than as a request to have the petition be considered as one for a Schedule A, Group II designation. For these reasons, the AAO will remand the petition to the director for consideration under Schedule A, Group I as a physical therapist.

Beyond the decision of the director, the AAO notes that the director should also review some additional issues. First, it is noted that the regulation at 20 C.F.R. 656.15(c)(1) requires that the petitioner must submit a letter or statement, signed by an authorized state physical therapy licensing official in the state of intended employment, stating the alien is qualified to take that state's written

licensing examination for physical therapists. In this matter, the record contains documents from Virginia[4] and Illinois, but does not contain the required letter from Florida, which is the state of intended employment.

Second, the petitioner submitted a notice of posting of the certified job, which states that the notice was posted from September 20, 2007 until October 5, 2007, pursuant to the requirements of 20 C.F.R. § 656.15.[5] However, the attestation of the CEO/President, [redacted] cannot be

[4] It is noted that the petitioner submitted a copy of a "Comprehensive Credential Evaluation Certificate for the Physical Therapist" issued to the beneficiary by the Virginia based '[redacted] Inc." It is not accompanied by a letter from the official licensing authority in Florida confirming that it recognizes this document in any capacity.

[5] The regulation at 20 C.F.R. § 656.15 states in pertinent part:

> (a) *Filing application.* An employer must apply for a labor certification for a *Schedule A* occupation by filing an application in duplicate with the appropriate DHS office, and not with an ETA application processing center.
>
> *(b) General documentation requirements.* A *Schedule A* application must include:
>
> > (1) An *Application for Permanent Employment Certification* form, which includes a prevailing wage determination in accordance with sec. 656.40 and sec. 656.41.
> >
> > (2) Evidence that notice of filing the Application for Permanent Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in sec. 656.10(d).

The regulation at 20 C.F.R. § 656.10(d) states in pertinent part:

> (1) In applications filed under Section 656.15 (Schedule A), 656.16 (Sheepherders), 656.17 (Basic Process), 656.18 (College and University Teachers), and 656.21 (Supervised Recruitment), the employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the Certifying Officer, as follows:
> >
> > (i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment. Documentation may consist of a copy of the letter and a copy of

considered as effective or probative that the posting was accomplished because it was dated "September 19, 2007," which was prior to the posting. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Third, the director should also consider the petitioner's ability to pay the proffered wage since the date that the Form I-140 was filed. It is also noted that the petitioner appears to have many

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> the Application for Permanent Employment Certification form that was sent to the bargaining representative.
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> (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice shall be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include locations in the immediate vicinity of the wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a). In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization. The documentation requirement may be satisfied by providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media, whether electronic or print, that were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.
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> * * *

(3) The notice of the filing of an Application for Permanent Employment Certification must:

> (i) State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
> (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
> (iii) Provide the address of the appropriate Certifying Officer; and
> (iv) Be provided between 30 and 180 days before filing the application.

employees and substantial revenue,[6] however its ability to pay the proffered wage[7] of $31.20 per hour ($64,896 per year) should also be viewed in the context that the petitioner has filed for multiple

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[6]The petitioner's tax return does not state any salaries or costs of labor paid. On remand, the petitioner should address this issue, or whether employees are placed off-site, and who will be the beneficiary's actual employer.

It is noted that in determining whether there is an "employee-employer relationship," the Supreme Court of the United States has determined that where a federal statute fails to clearly define the term "employee," courts should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-324; *see also* Restatement (Second) of Agency § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, ... all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In considering whether or not one is an "employee," U.S. Citizenship and Immigration Services (USCIS) must focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *see also* Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf.* New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; New Compliance Manual at § 2-III(A)(1).

In *Clackamas*, the specific inquiry was whether four physicians, actively engaged in a medical practice as shareholders, could be considered employees to determine whether the petitioner could qualify as an employer under the American with Disabilities Act of 1990 (ADA), which necessitates an employer with fifteen employees. The court cites to *Darden* that "We have often been asked to construe the meaning of 'employee' where the statute containing the term does not helpfully define it." *Clackamas*, 538 U.S. at 444, (*citing Darden*, 503 U.S. at 318, 322). The court found the regulatory definition to be circular in that the ADA defined an "employee" as "individual employed by the "employer." *Id. (citing* 42 U.S.C. § 12111(4)). Similarly, in *Darden,* where the court considered whether an insurance salesman was an independent contractor or an "employee" covered by the Employee Retirement Income Security Act of 1974 (ERISA), the court found the ERISA definition to be circular and adopted a common-law test to determine who would qualify as an "employee: under ERISA. *Id. (citing Darden*, 503 U.S. at 323). In looking to *Darden,* the court stated, "as *Darden* reminds us, congressional silence often reflects an expectation that courts will look to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning in common law. Congress has overridden judicial decisions that went beyond the common law." *Id.* at 447 *(citing Darden*, 503 U.S. at 324-325).

The *Clackamas* court considered the common law definition of the master-servant relationship, which focuses on the master's control over the servant. The court cites to definition of "servant" in the Restatement (Second) of Agency § 2(2) (1958): "a servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of services is subject to the other's control or right to control." *Id.* at 448. The Restatement additionally lists factors for consideration when distinguishing between servants and independent contractors, "the first of which is 'the extent of control' that one may exercise over the details of the work of the other." *Id. (citing* § 220(2)(a)). The court also looked to the EEOC's focus on control in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) and that the EEOC considered that an employer can hire and fire employees, assign tasks to employees and supervise their performance, and decide how the business' profits and losses are distributed. *Id.* at 449-450.

[7]The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States

beneficiaries. USCIS electronic records indicate that the petitioner has filed at least 22 Form I-140 petitions.

Based on the foregoing, the director's decision is withdrawn. The petition is remanded to the director to consider whether the petition meets,[8] and the beneficiary's eligibility, for the classification for blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I, as a physical therapist. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.

> employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

[8] The director should also consider whether the petition's alternate education and experience requirements of a Bachelor's degree and five years of experience meets any minimum Florida state education or licensing requirements for physical therapists.